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No. 98-1480

IN THE

Supreme Court of the United States

ROBERT A. BECK, II,

Petitioner,

v.

ROBERT M. PRUPIS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS LEONARD BELLEZZA, WILLIAM PAULUS, JR., HARRY OLSTEIN AND ERNEST J. SABATO

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Eleventh Circuit was correct in affirming the entry of summary judgment on a civil RICO conspiracy claim asserted under 18 U.S.C. §§ 1962(d) and 1964(c) where:

(i) plaintiff had no viable substantive claims under 18 U.S.C. §§ 1962(a)-(c);

(ii) plaintiff was not injured by any of the predicate acts of racketeering set forth in 18 U.S.C. § 1961(1); and

(iii) the purported overt act "in furtherance of" the RICO conspiracy was the termination of plaintiff's employment to avoid paying him certain contractual benefits and to retaliate against him for past whistleblowing activities.

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COUNTERSTATEMENT OF THE CASE

The decision that gives rise to the Petition, unlike all of the decisions comprising the "split in the circuits" identified by Petitioner, arises not from a Rule 12(b)(6) dismissal for failure to state a claim but from the entry of summary judgment on the basis of a full evidentiary record. Given the facts developed during discovery, Petitioner's case would not be able to withstand a summary judgment motion even in those circuits espousing the "minority" view. Thus, although a split in the circuits exists as to RICO standing for a terminated employee under 18 U.S.C. §§ 1962(d) and 1964(c), resolution of that split would not change the result here.[1]

A. Factual Background

Petitioner Robert A. Beck, II was a shareholder, director and former president of Southeastern Insurance Group, Inc. (SIG), a Florida-based insurance holding company. From 1983, when it was founded, until January 1990, when it declared bankruptcy, SIG owned insurance subsidiaries that wrote surety bonds for construction contractors. Defendants Leonard Bellezza, William Paulus, Jr., Harry Olstein and

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1. The Racketeer Influenced and Corrupt Organizations Act (RICO) authorizes private suits for treble damages by "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Section 1962 makes it unlawful for any person to use money derived from a pattern of racketeering activity to invest in an enterprise (§ 1962(a)), to acquire control of an enterprise through a pattern of racketeering activity (§ 1962(b)), to conduct an enterprise's affairs through a pattern of racketeering activity (§ 1962(c)) or to "conspire" to do any of the above (§ 1962(d)). *See* 18 U.S.C. § 1962.

Ernest J. Sabato (Respondents) were four members of SIG's Board of Directors.

In its early years, SIG was a small, thinly capitalized company that, because of its limited capital, issued bonds of only modest size to construction contractors. In August 1986, SIG raised $30 million of new capital through a private placement of stock and debenture bonds. R5-160-Exh. 11. This infusion of funds was intended to give SIG a higher capital base to enable it to issue larger bonds and, consequently, to generate higher earnings and profits. The long-term goal was to take SIG public, a strategy designed to allow SIG's original shareholders — including Beck — to sell their SIG stock as part of an initial public offering.

As SIG's president, Beck had an employment contract that permitted SIG to terminate him for an "inability or substantial failure to perform the material duties" assigned to him. R5-138-Exh. A [Exh. A thereto, ¶ 7.1(c)]. If Beck was "improperly terminated" — a phrase defined to mean terminated "for any reason other than set forth" in the contract — he had the option of selling his SIG stock back to SIG at "fair market value." *Id.*, ¶ 7.2. The apparent purpose of this provision was to ensure that Beck would reap the profits from an initial public offering even if he was no longer employed by SIG.

From 1983 through May 1988, Beck, as SIG's president, was responsible for overseeing the company's finances and operations, including "the monitoring of [its] financial performance." *Id.*, ¶ 3.1. Thus, Beck was effectively SIG's chief financial officer and was required to accurately report SIG's financial status to the Board of Directors and insurance regulators. R5-138-Exh. 4 at 86.

In the 18 months after the August 1986 private placement, management reports provided to both the Board and the Florida Department of Insurance by Beck and Ronald Prupis, SIG's CEO, indicated that the company was growing and profitable. *See generally* R5-138-Exh. C.[2]

In early 1988, because of SIG's reported success and profitability, the Board decided to assess whether SIG was ripe for an initial public offering. The Board needed complete and accurate information concerning SIG's operations and financial affairs, to be used as the basis for a Registration Statement and Prospectus if the Board decided to proceed with the public offering. Accordingly, in May 1988, the Board hired Firemark Consultants, Inc. (Firemark), an independent insurance consulting firm, to conduct an in-depth review of SIG's "operations, procedures, staff and management" in preparation for a possible initial public offering. R5-138-Exh. C.

The review was conducted, without restriction, at SIG's offices in May 1988 by Firemark's two principals, a surety claims specialist, a financial analyst and an administrative-personnel specialist. Firemark conducted one-on-one interviews of 72 SIG employees from every department, level and job function. R5-138-Exh. C.

On May 12, 1988, Firemark presented a preliminary oral report to SIG's Board of Directors, later memorialized in a written report. R5-138-Exh. C. Contrary to the

2. Beck's Petition is captioned "Robert A. Beck, II vs. Robert M. Prupis, et al." No "Robert M. Prupis" is involved in this case. Beck apparently intended to refer to defendant Ronald Prupis, who was SIG's CEO from August 1986 until his termination on May 13, 1988.

impression senior management had given the Board that SIG was well-run and profitable, Firemark reported that SIG was in organizational and financial disarray. Firemark found serious deficiencies in all phases of SIG's operations, including a detrimental "cash-flow" underwriting mentality whereby high-risk bonds were being issued and premiums being generated without regard to likely claims and losses. Firemark also found a lack of general management ability or knowledge of the insurance and surety business; a lack of budgetary controls and underwriting guidelines; a lack of formal personnel guidelines and salary administration; inexperience at all levels of staff and management; the existence of "cliques, in-circles, camps and favoritism"; and grossly inadequate claims procedures. Firemark concluded that SIG's Board had been misled by past reports:

> . . . SIG must frankly be considered a turnaround company. To refuse to acknowledge the number and gravity of problems, or to fail to understand the complexity and difficulty of establishing a profitable operation is shortsighted and dangerous. We are not faced with the task of restoring highly profitable results to an established company that has stumbled. Southeastern has yet to build an infrastructure, and in general has not established a solidly profitable business. *Any profits reported in the past are highly suspect, considering previous management's clearly demonstrated propensity to delude itself and the Board.*

R5-138-Exh. C (emphasis added).

Firemark made numerous recommendations, including the removal of SIG's entire senior management team — Beck (president), Ronald Prupis (CEO), Carl Shible (executive vice president of underwriting) and Linda Burton (senior underwriting officer). On May 13, 1988, in reliance on Firemark's recommendations, SIG's Board removed Beck and the other members of senior management.

B. Beck's RICO Conspiracy Claim

Beck filed RICO claims against SIG's officers and directors, including Respondents (collectively the SIG defendants), and against Firemark.[3] In his Complaint and RICO Case Statement, Beck alleged that the SIG defendants engaged in a pattern of racketeering activity, not against Beck himself but against third parties. Specifically, Beck alleged extortion and mail/wire fraud committed *against contractors* seeking surety bonds; "looting" *of SIG's insurance subsidiaries*; and mail/wire fraud committed *against First Fidelity Bank*, SIG's lender.

Beck admitted below that he was not entitled to damages as a direct result of these predicate acts aimed at third parties. But in claims asserted under RICO's substantive provisions, 18 U.S.C. §§ 1962(a)-(c), Beck alleged that he was injured indirectly because defendants'

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3. Beck's RICO claims were initially asserted as a crossclaim in a shareholders derivative suit filed against him and other SIG officers and directors in the United States District Court for the District of New Jersey. In March 1991, the federal district court in New Jersey severed Beck's crossclaim and transferred it to the Southern District of Florida pursuant to a forum-selection clause in his employment contract. For ease of reference, Beck's crossclaim is referred to in this brief as the "Complaint."

alleged activities "resulted in the failure of SIG" and "caused the value of Beck's stock to greatly depreciate." R5-138-Exh. B, ¶¶ 4.a.iv. & 16. He also alleged that he was "fraudulently induced" to purchase a SIG stock/debenture unit in August 1986 and to guarantee a $7.5 million loan from First Fidelity to SIG in December 1987. (Although Beck never paid money on the guaranty, he sought to recover the attorneys' fees he incurred defending First Fidelity's collection action.)

Beck also asserted a RICO conspiracy claim under 18 U.S.C. § 1962(d). He claimed that the SIG defendants conspired with Firemark to create false causes for his termination, not to further their alleged RICO enterprise but to deprive him "of the money due and owing to him under his employment contract with SIG," which required repurchase of his stock if he was fired without cause. R5-138-Exh. A at ¶¶ 13, 50, 59. Beck also claimed that defendants were motivated by a desire to retaliate against him for refusing to participate in their allegedly illegal activities and for previously blowing the whistle on defendants by reporting those activities to the Florida Department of Insurance. Beck claimed that his termination was an overt act in furtherance of the alleged RICO conspiracy. R5-138-Exh. A, ¶¶ 43-60. All of these assertions are repeated in Beck's Petition (at 3).

As is explained *infra*, such allegations cannot support a RICO conspiracy claim even under the minority view relied upon by Beck. In any event, four years of extensive discovery revealed that his claims were devoid of any factual support.

Contrary to the assertions of the Petition (at 3-4), Beck submitted no evidence to support his claim that SIG hired Firemark to fabricate criticisms of his performance or to give SIG a false excuse to terminate him. In fact, prior to transferring Beck's action to Florida, the federal district court in New Jersey dismissed the RICO claim against Firemark, finding no evidence of any conspiracy and nothing false about the Firemark report:

> It cannot be said that the [Firemark] Report itself is an objective manifestation of the [conspiracy] when Beck has failed to allege how the contents of the Report were false. Moreover, the questionable conduct described in the Report is attributed solely to neither Beck nor any other member of management. Additionally, *it is illogical for Beck to claim that the Report was false when it documents the same misconduct that Beck asserts occurred at SIG.*
>
> * * *
>
> Beck has nowhere provided any factual support for the allegation that the Report was false or that it blamed him exclusively for the misconduct at SIG. Although the Report does recommend Beck be terminated, it does not explicitly attribute any wrongdoing to Beck alone. If anything, the Report suggests that much of the management of SIG was to blame. The Report recommends termination or investigation of numerous officers or directors in addition to Beck.

R5-138-Exh. L at 44-45, 51 (emphasis added).

C. Respondents' Summary Judgment Motion

Beck did not appeal the dismissal of Firemark. Nevertheless, he pressed his claims against the SIG defendants, Firemark's alleged co-conspirators. After the close of discovery, Respondents moved for summary judgment in the United States District Court for the Southern District of Florida.

In opposing the motion, Beck submitted a lengthy statement of material facts, a brief and 55 exhibits, including documents and excerpts from deposition transcripts. Nine of those exhibits purportedly related to his claim that defendants fabricated causes for his termination. *See* R5-163 at 17-18 (citing R5-161-Exhs. 12 & 16; R5-162-Exhs. 36, 39, 42-44, 47-48). With respect to that claim, Beck contended — despite the dismissal of Firemark — that the SIG defendants' decision to retain Firemark was made at clandestine meetings and that Firemark falsely impugned Beck's managerial abilities.

The nine exhibits, however, showed that Beck's conspiracy claim was factually baseless. Five of the exhibits made no mention of Firemark at all, let alone of any secret meetings involving Respondents. Those exhibits merely consisted of hearsay statements of three SIG employees concerning rumors of Beck's possible termination and Ronald Prupis's attempt to limit Beck's power. None of those exhibits even remotely tended to prove that Respondents secretly hired Firemark to fabricate causes for Beck's termination; his citation to those exhibits was downright baffling.

Although the remaining four exhibits did refer to Firemark, they likewise failed to support Beck's conspiracy claim. Two of those exhibits consisted of double and triple hearsay statements by former Firemark employees that Firemark recommended Beck's termination because Joanne Morrissey (Firemark's president) wanted Beck's job. Quite apart from the incompetent nature of this multi-layered hearsay, even if it were true that Morrissey wanted Beck's job there was no evidence that Respondents knew of her career ambitions. Moreover, such a motive has absolutely nothing to do with alleged RICO predicate acts or the claimed RICO conspiracy.

The final two exhibits relied upon by Beck in support of his conspiracy claim consisted of deposition testimony of a SIG employee and of Michael Morrissey, another Firemark principal. Their testimony merely concerned the consulting work Joanne Morrissey performed at SIG after Beck and the other senior managers were terminated. It did not support Beck's claim that Respondents conspired with Firemark to fabricate reasons for his termination.

The district court granted Respondents' summary judgment motion in all respects. App. 23.

D. The Eleventh Circuit Decision

The United States Court of Appeals for the Eleventh Circuit affirmed the dismissal of Beck's RICO claims but vacated the dismissal of his common law fraud and negligence claims and remanded for further consideration. *Beck v. Prupis*, 162 F.3d 1090 (11th Cir. 1998). Beck seeks review only of that portion of the Eleventh Circuit's decision that affirmed summary judgment on his § 1962(d) conspiracy

claim. Indeed, Beck's Petition glosses over the fact that he alleged violations of RICO's substantive provisions based upon his status as shareholder, creditor and guarantor.

The Eleventh Circuit first addressed Beck's substantive claims under 18 U.S.C. §§ 1962(a)-(c). To the extent Beck alleged that defendants' conduct "led to SIG's demise, which in turn caused Beck's losses," these claims were "derivative" and thus "clearly barred by the proximate cause requirement [because] the detrimental effects of racketeering activity directed toward a third party (in this case, SIG) are not actionable under RICO." *Id.* at 1097 n.12 (App. 12) (citations omitted). The court also rejected Beck's claims that defendants "fraudulently induced" him to become a shareholder, creditor and guarantor, finding that Beck did not reasonably rely upon any misstatements and that defendants did not possess any fraudulent intent toward him. *Id.* at 1096-98 (App. 9-14). Thus, Beck had no viable substantive RICO claims.

Next, the Eleventh Circuit affirmed summary judgment on Beck's conspiracy claim under 18 U.S.C. § 1962(d), holding that terminated whistleblowers lack standing to pursue RICO conspiracy claims because their injuries are not proximately caused by predicate acts of racketeering. *Beck*, 162 F.3d at 1098-99 (App.14-18). The court reasoned that the predicate act injury requirement that applies to RICO's substantive provisions "applies equally well to RICO's conspiracy provisions." *Beck*, 162 F.3d at 1098 (App. 15). *See Holmes v. Security Inv. Protection Corp.*, 503 U.S. 258, 265-69 (1992); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497 (1985). "RICO was enacted with an express target — racketeering activity — and only those injuries that are proximately caused by racketeering activity should be actionable under the statute." *Beck*, 162 F.3d at 1098 (App. 15-16).

The Eleventh Circuit also concluded that the minority view would eviscerate the standing limitations of §§ 1962(a)-(c). "[R]equiring proof of direct injury by racketeering activity for section 1962(a)-(c), but not for section 1962(d), would (in addition to being logically inconsistent), allow plaintiffs to circumvent the requirements of the first three subsections simply by alleging a conspiracy." *Beck*, 162 F.3d at 1099 (App. 16-17), *citing Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir. 1993) ("the artful pleader . . . could circumvent the predicate act requirement applicable to suits based on § 1962(a)-(c) simply by alleging a conspiracy to commit those same substantive acts").

Finally, the Eleventh Circuit rejected Beck's argument that the majority view — which requires a RICO conspiracy plaintiff to prove injury resulting from a racketeering act — would render § 1962(d) superfluous. *Beck*, 162 F.3d at 1099 (App. 16-17). Under the majority view, the conspiracy provision still serves an independent and valuable function: it "allows persons who are responsible for an injury, but did not actually participate in the injury-causing activity, to be held liable." *Id.* at 1099. In other words, RICO's civil conspiracy provision establishes a procedural mechanism for holding all conspirators vicariously liable for the predicate acts committed by one of them. *Id.* at 1099 n.18 (whereas criminal conspiracy law is intended "to punish the act of the agreement itself," civil conspiracy law is intended to "impute liability" to other members of the conspiracy for the acts of the actual tortfeasor).

REASONS FOR DENYING THE WRIT

THIS CASE PRESENTS AN INAPPROPRIATE SETTING TO RESOLVE THE SPLIT IN THE CIRCUITS BECAUSE BECK'S WHISTLEBLOWER TERMINATION CLAIM IS FACTUALLY WITHOUT MERIT EVEN UNDER THE MINORITY VIEW, AND THEREFORE RESOLUTION OF THE SPLIT WOULD NOT CHANGE THE RESULT HERE.

Beck has identified a "split in the circuits" on the issue of whether a terminated employee has standing to assert a RICO conspiracy claim. The majority view holds that a terminated employee lacks such standing because the overt act in furtherance of the conspiracy — termination of employment — is not a predicate act of racketeering. The minority view holds that, in certain circumstances, a terminated employee can have such standing even though the overt act is not a predicate act of racketeering.

Although Beck argues that he would have standing to assert his RICO conspiracy claim under the minority view, he ultimately would have to face the same summary judgment motion brought here — one that required him to provide factual support for his claim that Respondents conspired with Firemark to fabricate causes for his termination. Under any view, Beck's conspiracy claim would be doomed by his inability to provide the requisite factual support.

The alleged conspiracy between Respondents and Firemark was the crux of Beck's § 1962(d) claim. Yet despite four years of discovery, Beck submitted no evidence that Respondents conspired with Firemark to fabricate

causes for his termination. As the New Jersey district court explained, there was no evidence that Firemark conspired with anyone, and it was "illogical for Beck to claim that the [Firemark] Report was false when it document[ed] the same misconduct that Beck assert[ed] occurred at SIG." Indeed, it would have been counterproductive for Respondents to hire Firemark to fabricate corporate wrongdoing when their purpose was to compile truthful information to be relied upon by prospective investors in connection with the planned public offering.

Nor could Beck substantiate his claim that Respondents harbored a retaliatory motive in terminating him. The nine exhibits Beck proffered in support of his retaliation claim were factually irrelevant and legally incompetent. The competent evidence adduced below showed that SIG's Board terminated Beck in reliance upon an extensive operational review conducted by Firemark, an independent consulting firm whose dismissal from this case Beck did not appeal. Significantly, the Firemark report did not blame Beck alone for the misconduct at SIG. Far from demonstrating a retaliatory motive against Beck, the report attributed blame to, and recommended termination of, SIG's entire senior management team.

None of the minority cases involved a situation like this, where the plaintiff had an opportunity to support his allegations with facts after extensive discovery but failed to do so. Indeed, prior to this case, all of the decisions comprising the split in the circuits arose on motions to dismiss pursuant to Rule 12(b)(6).[4] Given Beck's inability

4. The majority view is expressed in *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 43 (1st Cir. 1991); *Hecht v. Commerce Clearing*

(Cont'd)

to muster any facts to support his claim of retaliatory discharge, the minority view of RICO conspiracy standing cannot help him.

The lack of factual support for Beck's claims also means that he cannot satisfy RICO's proximate cause requirement as construed by the minority courts. RICO authorizes civil suits by "[a]ny person injured in his business or property *by reason of* a violation of section 1962." 18 U.S.C. § 1964(c) (emphasis added). Section 1964(c) requires any RICO plaintiff to prove that the RICO violation was the proximate cause of his injury, not merely the "but for" or "factual" cause. *Holmes*, 503 U.S. at 266-68. In the context of RICO conspiracy claims, the minority courts explain that, to satisfy the proximate cause requirement, the plaintiff must prove that he was injured "by reason of" an "overt act in furtherance of" the conspiracy. *Schiffels*, 978 F.2d at 348-50; *see Khurana*, 130 F.3d at 153-54; *Shearin*, 885 F.2d at 1167, 1169. Beck, however, cannot prove that he was injured "by reason of" an "overt act in furtherance of" the conspiracy.

First, given Beck's failure to provide evidentiary support for his retaliatory discharge claim, his discharge

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(Cont'd)

House, 897 F.2d 21, 22 (2d Cir. 1990); *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 384 (8th Cir. 1993), *cert. denied*, 508 U.S. 957 (1993); and *Reddy v. Litton Industries*, 912 F.2d 291, 293 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991). The minority view is expressed in *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1164 n.1 (3d Cir. 1989); *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 146 (5th Cir. 1997), *cert. granted, judgment vacated as moot*, 119 S. Ct. 442 (1998); and *Schiffels v. Kemper Fin. Services, Inc.*, 978 F.2d 344, 346, 353 (7th Cir. 1992).

was not wrongful and thus was not an "overt act" capable of sustaining his civil conspiracy claim. Only wrongful or tortious overt acts can support civil conspiracy liability. *See* W. Page Keeton, *Prosser & Keeton on the Law of Torts*, § 46 at 324 (5th ed. 1984) (to hold defendants liable for civil conspiracy, "some act must be committed by one of the parties in pursuance of the agreement, *which is itself a tort*") (emphasis added); *Flinders v. Datasec Corp*, 742 F. Supp. 929, 934-35 n.8 (E.D. Va. 1990) (under minority view, overt act supporting civil RICO conspiracy claim must be "wrongful" or "tortious" since "recovery in tort is limited to injuries arising from unlawful acts").

Second, even assuming Beck could prove that he was the victim of a retaliatory discharge, he still could not prove that the discharge was "in furtherance of" the RICO conspiracy — a requirement of proximate cause. *See Schiffels*, 978 F.2d at 350; *Khurana*, 130 F.3d at 153-54. Even courts in the minority agree that employment termination is not "in furtherance of" a RICO conspiracy if the termination occurs after the employee has already exposed the fraudulent scheme and the termination is simply to punish or retaliate against him for blowing the whistle. For example, in *Schiffels*, the Seventh Circuit found a RICO conspiracy claim deficient because plaintiff's allegations indicated "only that she was fired in retaliation for attempting to disclose the fraudulent scheme, not to further it or prevent its disclosure." 978 F.2d at 350-51, 353. Similarly, a district court in the Third Circuit — another minority jurisdiction, *see Shearin*, 885 F.2d at 1168-69 — dismissed a RICO conspiracy claim because plaintiff's termination "would not prevent her from disclosing the alleged illegalities." *Casper v. Paine Webber Group, Inc.*, 787 F. Supp. 1480, 1499-1500 (D. N.J. 1992).

Here, Beck asserted that the SIG defendants (1) retained Firemark to "provide the directors an excuse to terminate Beck's employment without having to repurchase Beck's stock" pursuant to his employment contract, and (2) terminated him for "his refusal to participate in and his blowing the whistle on the defendant directors' RICO conspiracy." Petition at 3. Even assuming that those assertions could be supported factually, such conduct would not be "in furtherance of" a RICO conspiracy.

The first assertion merely relates to an alleged breach of Beck's employment contract. If Respondents' motive in firing Beck "for cause" was to avoid the stock repurchase obligation, the firing would not advance the alleged conspiracy to defraud contractors or to loot SIG's insurance subsidiaries. At best, it might give Beck a common law claim for breach of contract.

The second assertion also provides no support for Beck's conspiracy claim. Beck testified that he blew the whistle on the alleged conspiracy in early May 1988 when he advised the Florida Department of Insurance of defendants' alleged wrongdoing.[5] Because Beck had *already exposed* the alleged RICO conspiracy to the insurance regulators, his subsequent termination cannot be considered "in furtherance of" that conspiracy, even under the minority view. *See Schiffels*, 978 F.2d at 350-51, 353; *Casper*, 787 F. Supp. at 1499-1500; *see also United States v. Steele*, 685 F.2d 793, 801 (3rd Cir. 1982) (acts occurring

5. Under Florida law, the insurance regulators were obligated to investigate allegations of wrongdoing and had broad investigative powers. Fla. Stat. §§ 624.307 & 624.321; *Florida Dep't of Ins. and Treasurer v. Bankers Ins. Co.*, 694 So. 2d 70, 71-74 (Fla. App. 1997).

after criminal bribery scheme was revealed to Governor of Puerto Rico were not committed "in furtherance of" the conspiracy); *cf. United States v. Maze*, 414 U.S. 395, 401-03 (1974) (under mail fraud statute, there was insufficient connection between mailings and execution of respondent's scheme where mailings "increased the probability that respondent would be detected and apprehended").

Indeed, even after the termination, nothing prevented Beck from further exposing the alleged fraud by continuing his conversations with the insurance regulators or, in his capacity as a substantial SIG shareholder, calling a shareholders' meeting and demanding an investigation. *See Casper*, 787 F. Supp. at 1500 (plaintiff's termination was not in furtherance of RICO conspiracy because it "would not prevent her from disclosing the alleged illegalities, but rather invites [her] to disclose the alleged unlawful schemes").

Moreover, prior to Beck's termination, Respondents' own actions resulted in the exposure of the wrongdoing at SIG. It was Respondents who hired Firemark to audit SIG's operations, and it was Firemark whose investigation revealed the conduct that Beck alleges comprised much of the RICO predicate acts. Because Respondents themselves helped to expose the wrongdoing, their subsequent termination of Beck could not have been "in furtherance of" the conspiracy; the cat was already out of the bag. *Cf. Fiswick v. United States*, 329 U.S. 211, 217 (1946) (co-conspirator's confession is not "in furtherance of" a conspiracy but rather is in frustration of it); *see also Wong Sun v. United States*, 371 U.S. 471, 490-91 (1963) (same).

In sum, even under the minority view, Beck cannot establish a RICO conspiracy claim. Because he produced no evidence to support his claim of retaliatory discharge, his termination was not a "wrongful" overt act. Moreover, because the termination occurred after Beck blew the whistle, it could not have been "in furtherance of" the alleged RICO conspiracy. Given these deficiencies, Beck cannot prove that his termination was "proximately caused" by the RICO conspiracy. *See Holmes*, 503 U.S. at 266-68; *Schiffels*, 978 F.2d at 353.

The outcome of Beck's RICO conspiracy claim would thus be the same under either the majority "predicate act" view or the minority "overt act" view. Because a grant of certiorari would not lead to a different result in this case, resolution of the split in the circuits should await another day.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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